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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 303

UNITED STATES OF AMERICA, APPELLANT

v.

VON'S GROCERY COMPANY AND SHOPPING BAG FOOD STORES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 3017) is reported at 233 F. Supp. 976. The court's findings of fact and conclusions of law (R. 3064) are unreported.

JURISDICTION

The judgment of the district court was entered on December 17, 1964 (R. 3091), and the notice of appeal was filed by the United States on February 12, 1965. This Court noted probable jurisdiction on October 11, 1965 (R. 3105; 382 U.S. 806).

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903,

32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Aluminum Co. of America,* 377 U.S. 271.

QUESTION PRESENTED

The third and sixth largest sellers in the $2.5 billion Los Angeles retail grocery market—direct competitors—merged. The aggregate market share of the merged firms—8.9 percent—exceeded that of any other seller in the market. The market was already tending toward oligopoly, as evidenced (among other things) by the fact that the 8 largest sellers at the time of the merger had an aggregate market share of almost 39 percent; and the merger substantially raised the level of concentration. The question presented is whether such a merger violates the prohibition of Section 7 of the Clayton Act against mergers whose effect may be substantially to lessen competition.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

The United States filed its complaint in this civil antitrust action on March 25, 1960, charging that the effect of the acquisition by Von's Grocery Company ("Von's") of Shopping Bag Food Stores ("Shopping Bag") might be substantially to lessen competition or tend to create a monopoly in the sale of groceries and related products in the Los Angeles metropolitan area, in violation of Section 7 of the Clayton Act (15 U.S.C. 18). The government's request for a temporary restraining order was denied and the merger was consummated on March 28, 1960.[1] After trial, the district court (Judge Carr) held that no violation of Section 7 had been proved, and dismissed the complaint.

1. THE MERGING COMPANIES

Von's and Shopping Bag were among the leading grocery retailers in the Los Angeles area. Both companies sold a complete line of groceries and related products in modern, self-service, cash-and-carry supermarkets;[2] both bought directly from suppliers; and

[1] On June 30, 1960, the court denied the government's request for a preliminary injunction, which would have required separation of the two companies' operations pending the outcome of the suit, and stated that "the stores themselves are the basic assets of the business and the stores may be divested individually or in a group."

[2] Before the merger, the average sales of individual stores of each defendant compared favorably with all other chains in the Los Angeles Metropolitan Area. For Von's, average sales per store exceeded $3 million, while Shopping Bag's average sales per store approximated $2.1 million (GX 13, R. 2348: Pre-Trial Order, Part III, pars. 8, 12, R. 14-15). A super-

both operated their own warehouse and distribution centers and maintained fleets of trucks to service their stores (Fdgs. 3, 5, 9, 55, R. 3065–3066, 3081). Each had commenced operations in the early 1930's, had grown significantly, and was a large, profitable and expanding firm (Fdgs. 1–3, 6–9, 12(b), R. 3064–3067; GX 16, R. 2357). Each had achieved its present size through internal expansion, that is, by building and leasing its own stores rather than by merging with or acquiring other grocery enterprises.

In 1958, Von's operated 27 grocery supermarkets in the Los Angeles metropolitan area. Its total sales of approximately $94,000,000 constituted 4.7 percent of all retail grocery store sales in the area and made it the third largest grocery chain there (R. 3023). Between 1948 and 1958, it had doubled the number of its stores, almost doubled its share of the market, and quadrupled its sales (Fdgs. 3, 12(b), 25, R. 3065–3066, 3071).

In 1958, Shopping Bag operated 36 supermarkets, with total sales of approximately $90,531,000. Thirty-four of the stores, with sales of approximately $84,164,000, were located in the Los Angeles metropolitan area, which gave Shopping Bag approximately 4.2 percent of the total retail grocery store sales and a rank of sixth in the area (R. 3023, 3066). In 1948, Shopping Bag had had only 15 stores in the area, and between 1948 and 1958 had increased its sales sevenfold

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market is variously defined as a grocery store with annual sales in excess of $300,000, $500,000, or $1 million. See *The Supermarket Industry Speaks* (16th Ann. Rep. by Supermarket Institute, 1964), p. 11.

and had more than tripled its share of the market. (Fdgs. 9, 12(b), 25, R. 3066, 3067, 3071).

2. THE CHANGING STRUCTURE OF THE RETAIL GROCERY INDUSTRY IN THE LOS ANGELES METROPOLITAN AREA

The parties agreed and the district court found that the area's twenty leading supermarket chains were all part of a network of retail grocery-store competition in which the major grocery chains, as well as other grocers, "frequently responded to competitive practices originated by one of the other major chains" (Pre-trial Order, Part III, Par. 46, R. 19; Fdgs. 39, 41, R. 3076–3077; GX 84,[3] R. 1995–1997).[4] The district court found that both Von's and Shopping Bag were "substantial competitive factors" in this market (Fdg. 42, R. 3077). In terms of dollar sales, industry position, market shares, number of stores operated, expansion activity, impact upon prices, and consumer acceptance, they were plainly among the market's leaders (Pre-trial Order, Part III, Pars. 6–52, R. 14–20; GX 4–5, 9–23, 27, 29–32, R. 2329–2330, 2333–2378, 2385, 2401–2408).

Moreover, Von's and Shopping Bag were both among the relatively few grocery chains able to engage in area-wide advertising, particularly in the metropolitan newspapers with broad circulation (GX

[3] This exhibit was inadvertently omitted in the printing of the record. It is reproduced as Appendix B hereto, p 47, *infra*.

[4] Examples of the way in which competitive practices spread through the area "like a communicable disease" (R. 1995) were the widespread adoption of trading stamps (R. 1344) and the responsiveness of the area's chains to Von's effort to eliminate loss leaders and reduce shelf prices generally on several hundred grocery items (R. 1234–1235, 1343–1344, 2018).

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17–19, R. 2358–2366).[5] In addition, the major chains, including Von's and Shopping Bag, carefully checked and attempted to match each other's prices (GX 23–26, R. 2377–2383).[6] Indeed, these two firms were among the seven (the others were Ralph's, Safeway, Alpha Beta, Market Basket and Thriftimart—all among the ten largest grocery chains in the area) which were included in the *Competitive Survey* book, now known as the *Key Survey* book, a weekly publication sold to all major chains and many independents in Southern California that contained the shelf prices charged for some 3,000 grocery items (GX 21, 22, R. 2369, 2374; R. 903–904). This pricing survey was uti-

[5] In 1959, Von's net cost for advertising was $738,906 and Shopping Bag's gross advertising expenditures (without allowances for coopertaive advertising) were $1,187,627 (GX 17, 19, R. 2358, 2364).

[6] Von's maintained and kept copies of the weekly advertising of the major chains in its files and regularly selected the Shopping Bag advertisements for this purpose (GX 24, (unprinted)). Similarly, Shopping Bag closely followed the prices of other chains when it set its own prices (GX 25, R. 2379). William R. Hayden, former president of Shopping Bag, testified on this subject as follows (GX 23, R. 2377):

> Q. It is your judgment that prior to the merger your prices were the same as Safeway and Ralphs and Von's and Market Basket, Thriftimart?
>
> A. That's right.
>
> Q. As Food Giant, as Alpha Beta?
>
> A. I would say that all prices—we check one another to see what the other man is doing, and we know that we can't demand any more from the customer than the other fellow on a nationally known item. There may be items in our store that we wouldn't be to the penny the same price, whether it be a mistake in the pricing or a mistake that the store would fail to catch when they made their price changes.

lized by chain and independent grocery retailers in setting prices for their grocery items (GX 72, *e.g.*, R. 40, par. 2, R. 76, par. 3).

Not all of Von's and Shopping Bag's individual stores were in the same immediate vicinity, although the parties agreed and the district court found that where the stores of each company were so "located that both could compete for some of the same customers" "the competition was intensive" (Fdg. 41, R. 3077; Pre-trial Order, Part III, Par. 46, R. 19). In discussing the "draw" area for customers, the district court, relying heavily on information provided by Dr. Ward Jenssen, a government witness, noted that the average customer was willing to drive at least 10 minutes, or about 4 miles, and to pass by other stores, in order to reach a particular store (Fdg. 39, R. 3076).[7]

Dr. Jenssen's testimony indicated that on the basis of ten minutes' driving time, almost half the stores

[7]. W. D. Hayden, a director of Von's who had been in the grocery business since 1932, testified that Von's-Shopping Bag stores can draw *five* miles and that customers will pass other stores to get to the store of their choice (R. 1356–1357). While appellees' witness Bouque assumed a theoretical draw area of 1½–2 miles when making a study of competition between Von's and Shopping Bag prior to the merger (R. 1732–1733), he clearly demonstrated the importance of the outer 2 miles of an over-all 4 mile draw area by testimony which indicated that between 10 and 40 percent of all customers of Von's and Shopping Bag came from outside a 2-mile radius of any Von's or Shopping Bag store (DX BF, R. 1825). Von's president also noted that loss of a major part of these customers would be a serious problem, and that Von's would be forced to take measures to regain this trade, *e.g.*, by advertising special promotions (R. 1298–1303).

of the two concerns, with aggregate sales of approximately \$76 million, were in a position to compete directly for the business of more than one million of the same customers, who bought a total of nearly \$500 million in grocery products per year (R. 2023–2024; GX 13, R. 2348; GX 85[8]). On the basis of defendants' figures, more than 20 percent of their stores were so located as to be likely to draw customers from overlapping areas (DX AV, EX E, R. 2914; R. 1277–1283, DX BF, R. 1755, 1758, 1799). In 1960, the sales of these stores exceeded \$48 million—approximately 25 percent of defendants' combined total sales (GX 13, R. 2348).

The Los Angeles metropolitan area, which was stipulated to consist of Los Angeles and Orange Counties, California, is the second largest metropolitan area in the United States in population, income, and retail sales.[9] At the time of the merger, approximately 6,750,000 persons resided in the area and total retail sales of groceries were in the neighborhood of \$2.5 billion annually (Fdg. 15, R. 3068). In 1960, some 4,000 separate retail grocery concerns operated

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[8] GX 85, inadvertently omitted in the printing of the record, is printed as Appendix C hereto, p. 48, *infra*.

[9] In 1960, there were only seven States in the United States with larger populations than the Los Angeles metropolitan area (GX 2, R. 2328); and the area's population was larger than the combined populations of the eleven smallest States in the United States and the District of Columbia (GX 3, R. 2329). The area's total retail sales were approximately \$9.1 billion in 1957, representing 42 percent of all California retail sales, 33 percent of total Pacific Coast retail sales, and 25 percent of such sales in the eleven western States (Pre-trial Order, Part III, Par. 23, R. 16).

approximately 4,800 stores in the area (Fdg. 73, R. 3084). However, the 12 largest enjoyed 50 percent of the total sales (GX 8, R. 2332 (1958 figures)).

This concentration seems, in part at least, to reflect a long-term decline in the number of small, single-store operators and an increasing trend to large supermarkets operated by local and national chains. The district court found that between 1950 and 1963, the number of single-store grocery operators in the Los Angeles area decreased by 1,775, from 5,365 to 3,590, and the number of stores operated by chains of two or more stores increased by 102, from 856 to 958 (Fdg. 23, R. 3070; GX 33–35, R. 2409–2412; R. 914). This decline was accompanied by a marked increase in the percentage of total retail grocery sales controlled by large chains.[10] In 1948, the leading 20 chains accounted for 43.8 percent of all such sales; in 1958, for 56.9 percent (R. 3023). Department of Commerce statistics show that the market shares accounted for by the eight largest chains in the area increased from 33.7 percent in 1948 to 40.9 percent in 1958; for the 12 largest chains, from 38.8 percent in 1948 to 48.8 percent in 1958; and for the 16 largest chains, from 41.6 percent in 1948 to 53.4 percent in 1958 (GX 6, 7, 87, R. 2330–2331, 902).

This trend seems likely to continue. The district court found that of the 247 new grocery stores opened in the area in 1960, 119 were opened by concerns

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[10] The district court's erroneous finding that concentration was decreasing is considered *infra*, p. 34, n. 33.

operating at least one other store (Fdgs. 47, 59, R. 3079, 3082; GX 36, R. 2412)—67 of them by the leading 20 chains (Fdg. 59, R. 3082). In addition, the leading chains account for a predominant share of the business generated by new openings. The 20 leading chains enjoyed 67.8 percent of the total sales of all grocery stores opened in 1960 (GX 43, R. 2417), and 25 of the 29 new stores that year which had sales of more than $2 million were opened by such chains (GX 37, R. 2413). Most store closings are by single-store operators and the smaller chains (GX 36, 38–42, R. 2412, 2414–2417).

The market's rising level of concentration since 1948 has been accompanied by a pattern of purchases of established stores by the area's major chains. The National Association of Retail Grocers so recognized in a study of the merger movement in retail food distribution which it published in 1959. "The three Pacific states of California, Oregon and Washington rank second among the geographic divisions [of the United States] in terms of sales volume of food stores absorbed by mergers. Los Angeles was the prime center of such acquisitions." [11]

A table prepared by Dr. Willard F. Mueller, Chief Economist of the Federal Trade Commission, from figures obtained by the Commission as part of its

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[11] This study, entitled *The Merger Movement in Retail Food Distribution 1955–1958 (A Four-year Study of the Trend Toward Centralized Power in America's Major Distributive Industry)*, is printed in Hearings Before a Subcommittee of the Sen. Select Committee on Small Business, 86th Cong., 1st Sess., Appendix II, pp. 61, 64 (1959).

study of food marketing shows that between 1949 and 1958 nine of the leading 20 chains in the Los Angeles metropolitan area acquired 126 grocery stores from concerns outside the top 20 chains (GX 44, R. 2418; R. 906).[12]

[12] The Commission's study was confined to chains with 11 or more stores in 1958. The record establishes, however, that members of the leading 20 chains with fewer than 11 stores also made acquisitions during this period (R. 908–909). Moreover, information developed from the work papers of a principal defense witness, Godfrey Lebhar, clearly demonstrates the substantiality of merger activity among the area's leading chains during the 1953 through 1961 period (GX 78, R. 2503). His papers record the following acquisitions and mergers, among others, and show that 5 of the leading 10 chains in the Los Angeles area as of 1958 (Food Giant, Alpha Beta, Fox, Mayfair, and Von's—see GX 4, R. 2329) made acquisitions of stores between 1957 and 1961:

Year	Acquiring firm	Acquired firm	Number of stores acquired
1957	Piper Mart	Bi-Right & Big Bear	3
1958	Mayfair	Bob's Supermarket	7
1961	Better Foods	Border's Markets	3
1959	Kory's Markets	Carty Brothers	8
1958	Food Giant	Clark Markets	15
1958	Fox	Desert Fair	4
1959	Lucky	Hiram's	6
1958	Fox	Iowa Park Shops	11
1957	Lucky	Jim Dandy Mkts	9
1961	Food Giant (and others)	McDaniel's Markets	10
1957	Food Giant	Panorama Markets	3
1958	Pix	Patton's Mkts	4
1958	Alpha Beta	Raisin Markets	13
1960	Piggly Wiggly	Rankins Markets	4
1959	Pix	S & K Markets	2
1960	Von's	Shopping Bag	37
1959	Pix	Shop Right Markets	8
1958	Yor-Way	C. S. Smith	5
1957	Food Giant	Toluca Marts	2
1957	Mayfair	U-Tell-Em Markets	10
	Total		160

In 1958, 99 of the acquired stores were still operated by the acquiring chains and had sales of $192.9 million, an amount equivalent to nearly 75 percent of the increase in market shares of the 20 leading chains between 1949 and 1958 (GX 6, 44, 45, R. 2330, 2418, 2420; R. 906–907). During the same period, these chains disposed of a substantial number of unwanted outlets; and without the acquired stores the market share of the chains in 1958 would likely have dropped from 56.9 percent to 47.3 percent (R. 907). "It is therefore apparent," Dr. Mueller concluded, "that a good part, if not all, of the increasing concentration in the twenty largest grocery chains resulted from acquisitions" (*ibid.*).

3. THE MERGER

Discussions of a possible merger between Von's and Shopping Bag were initiated by Von's president in late 1957 or early 1958 (GX 46, R. 2421), after Von's had unsuccessfully explored merger possibilities with officials of Kroger (DXAF, R. 2747; R. 1264) and with Alexander Markets (R. 1264). By 1959, Shopping Bag, and its president and principal stockholder, W. R. Hayden, became concerned that Shopping Bag's earnings and profits were declining (Fdg. 12(b), R. 3066), although the three preceding years had been profitable, and 1957—the year the merger discussions began—had been the most profitable in the firm's history (R. 1293).[13] The merger

[13] In addition, the district court found that Mr. Hayden wanted to become less active in Shopping Bag's affairs, but was worried because its existing management was not strong (Fdg. 12(c), R. 3067); that since both Von's and Shopping

between Von's and Shopping Bag was consummated on March 28, 1960, with Von's emerging as the surviving corporation;[14] since that time, the combined firm has operated as a single entity in the relevant market (Pre-trial Order, Part III, Pars, 4, 6, 10, 11, 41, R. 13–14, 18; GX 9–11, 21–23, 27, 47–71, R. 2333–2345, 2369–2378, 2385, 2423–2497; GX 72, *e.g.*, R. 42, par. 11; Fdg. 50, R. 3080). After the merger, Von's had total assets of approximately $42,000,000 and, on the basis of 1958 figures,[15] ranked first in the Los Angeles retail grocery market with approximately 8.9 percent of total sales.[16] The district court found that

Bag were largely family owned, the death of any family member might result in estate-tax problems and possibly the forced sale of stock (Fdg. 12(e), R. 3068); and that the merger would result in greater efficiencies and some lower operating costs (Fdg. 12(d), R. 3067).

[14] Shopping Bag shareholders received Von's stock in return for their Shopping Bag stock (Fdg. 11, R. 3066).

[15] 1958 is the last year before the merger for which Bureau of the Census figures—whose reliability is conceded—are available.

[16] A table in the district court's opinion (R. 3023) lists the market share and industry rank of the ten leading chains for 1958 (based on a Census universe) as follows:

	Rank in sales		Sales in Los Angeles metropolitan area	Percentage
	Before merger	After merger		
Total of Von's and Shopping Bag		1	$177,867,000	8.9
Safeway	1	2	161,233,000	8.0
Ralph's	2	3	128,283,000	6.4
Von's	3		93,703,000	4.7
Market Basket	4	4	88,806,000	4.4
Thriftimart	5	5	88,583,000	4.4
Shopping Bag	6		84,164,000	4.2
Food Giant	7	6	72,727,000	3.6
Alpha Beta Raisins	8	7	62,727,000	3.1
Fox Markets	9	8	56,438,000	2.8
Mayfair	10	9	39,360,000	2.0
Total				43.6

Von's ranked second to Safeway after the merger in 1960 (Fdgs. 50, R. 3080).[17]

4. THE DISTRICT COURT'S OPINION

The district court first held, in accordance with the stipulation of the parties, that the merging firms had been engaged in interstate commerce at the time of the merger; that the relevant line of commerce (product market) was the retail sale of groceries and related products[18] and the relevant section of the country (geographical market) was the Los Angeles metropolitan area (consisting of Los Angeles and Orange Counties); and hence that the sole issue for decision was whether, in this market, the merger had the adverse effects on competition specified in Section 7 (R. 3020–3021). On this point, the court found that the market was characterized by frequent and easy entry of new competitors and was vigorously competitive, and that the smaller sellers were able to hold their own in competition with the major chains (R. 3024–3025, 3031). The court then indicated that these factors in its view outweighed any possible adverse effect on the structure of the market produced by the merger. Concluding that there was no probability that the merger would lessen competition in the relevant mar-

[17] We discuss this finding, *infra*, n. 36, p. 37.

[18] These are the products "usually and customarily offered for sale in supermarkets and grocery stores, and consist of groceries, meats, produce, bakery goods, dairy products, delicatessen products, frozen foods, fruits, vegetables, household supplies, drugs and sundries * * *" (Fdg. 14, R. 3068).

ket, the court directed that judgment be entered for defendants (R. 3031).

ARGUMENT

INTRODUCTION AND SUMMARY

The retail sale of groceries and related products customarily offered for sale in grocery stores and supermarkets constitutes the nation's largest industry by a substantial margin.[19] It is so large that its local markets in many instances dwarf whole industries. Los Angeles, the setting for the merger here in issue, is a case in point. Retail sales of grocery products there (the nation's second largest metropolitan area) amount to some $2.5 billion annually. Von's and Shopping Bag, the parties to the merger, had combined sales of almost $180 million per year.

The grocery industry is also a traditional bastion of the small businessman. There are more single-unit businesses in this industry,[20] most of them quite small, than in any other American industry. To be sure, the number of grocery stores has declined in recent years with the growth of the supermarket method of food retailing; and grocery chains, like Von's and Shopping

[19] Total annual sales of all grocery stores were $52.6 billion in 1963. *1963 Census of Business—Retail Trade—United States*, p. 1–6, category 541. In comparison, total sales of all retail shoe stores, for example, were $2.4 billion and of all franchised automobile dealers $37.4 billion. *Id.*, p. 1–7, category 566, Table 2, and category 551.

[20] 215,129. *1963 Census of Business*, *supra*, RS4, p. 4–17 (Table 2).

Bag, have grown. Nevertheless, while the food industry today contains more corporate giants, and fewer corner groceries and other small firms, than it once did, it remains an industry where large firms are not yet dominant and the opportunities of individual entrepreneurs are substantial. Furthermore, from all indications, its technology is such that, even today, and for the indefinite future, many relatively small firms should be able to thrive.

This general pattern is instanced by Los Angeles. At the time of the merger, there were 4000 separate grocery businesses in the Los Angeles metropolitan area, and they operated a total of 4800 separate stores. No firm had more than an 8 percent share of the area's total grocery business (DXAM, R. 2787), and it appears that small chains, and even some single-store enterprises, were able to operate efficiently and to hold their own in competition with the larger chains. Nevertheless, a large share of the business was held by a relatively few large firms, and such concentration appeared to be on the rise. Thus, for example, the 8 largest firms in 1958 accounted for almost 39 percent of the area's total grocery sales, and the 3 largest for 19 percent.[21]

In the present case, the government challenged under Section 7 of the Clayton Act, as amended in

[21] See district court's table (R. 3023), Statement, *supra*, p. 13, n. 16. Throughout, we emphasize 1958 figures (though the merger took place in 1960), for the reasons explained in n. 15, p. 13, *supra*; see n. 33, p. 34, *infra*.

1950 by the Celler-Kefauver Antimerger Act, the merger in 1960 of the third (Von's) and sixth largest (Shopping Bag) retail sellers of grocery products in Los Angeles; these were large and profitable firms which before the merger had combined sales of almost $180 million per year and a combined market share of almost 9 percent[22]—more than any other seller. The importance of whether such a merger is permissible under Section 7 need not be labored. The question involves the nation's largest industry, and substantial firms in one of that industry's largest local markets—a market itself far larger in monetary terms than many industries. Moreover, the legislative history of the Antimerger Act discloses particular concern with the competitive dangers of merger activity in sectors of the economy which are traditionally areas of individual enterprise and small-business opportunity, and Congress specifically referred to the retail grocery industry as one of those areas.[23]

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[22] Von's had 4.7 percent; Shopping Bag 4.2 percent. Statement, *supra*, p. 13, n. 16.

[23] As the House Report states, "recent merger activity has been of outstanding importance in several of the traditionally 'small business' industries. More acquisitions and mergers have taken place in textiles and apparel and food and kindred products—predominantly 'small business' fields—than in any other industries." H. Rep. No. 1191, 81st Cong., 1st Sess., p. 3. It seems clear that the Report was referring, among other things, to mergers among grocery retailers. See *Report of the Federal Trade Commission on the Merger Movement—A Summary Report* (1948), pp. 52-53. Congress drew heavily in its consideration of the merger problem on this FTC report. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315.

We believe that the district court erred in holding this merger not barred by Section 7. We do not quarrel with most of the court's subsidiary findings, but we think it applied an incorrect legal standard in that it failed to accord sufficient weight to Congress' paramount concern with arresting tendencies toward concentration. If the district court applied the wrong standard, this Court is free to ignore the district court's ultimate judgment on the legality of the merger.

We divide our argument into two parts. In the first, we propose as the proper standard for judging this merger a test of presumptive illegality, drawn from the general standards and basic purposes of Section 7 and applicable generally to mergers such as that at bar between direct competitors in markets where economic power is still relatively dispersed. Since Congress' foremost concern was to prevent the rise of oligopolies, wherein a few sellers control the bulk of a market's business, we urge that such a merger should be deemed presumptively illegal when it (1) occurs in a market where there is a significant tendency in the direction of undue concentration and (2) appreciably increases the existing level of concentration.

In proposing such a test, we follow the path broken by this Court in *United States* v. *Philadelphia National Bank,* 374 U.S. 321. Because of factual differences between the cases, we do not suggest that the standards fashioned in *Philadelphia Bank* are

appropriate here. But we think that the Court's general approach of basing decision upon a few criteria consonant with the statute remains valid in the present context, and that the test we propose is justifiable on that basis.

Applying this test to the particular facts here, we first show that at the time of the merger the Los Angeles grocery market was already loosely oligopolistic in structure, had a history of increasing concentration, and apparently was at (albeit not yet across) the threshold of oligopoly pricing. Hence, undue concentration was clearly foreseeable if substantial mergers between competitors in the market were permitted to take place. We next show that the merger of Von's and Shopping Bag, in combining the third and sixth largest sellers in that market, with an aggregate market share of almost 9 percent (more than any other single firm), increased concentration appreciably. A leading competitive factor in the market (Shopping Bag, the acquired firm), with a 4.2 percent market share, was eliminated by the merger, and this significantly reduced the number of major competitors and increased the market share and potential power of those that remained. Since the merger thus moved the market significantly in the direction of undue concentration, we conclude that it is presumptively illegal. In the last part of our argument, we show that the presumption of illegality established by the foregoing facts has not been rebutted.

I

A MERGER BETWEEN DIRECT COMPETITORS WHICH OCCURS IN A MARKET STILL RELATIVELY UNCONCENTRATED BUT BEGINNING TO DISPLAY THE ATTRIBUTES AND SYMPTOMS OF OLIGOPOLY, AND WHICH CONTRIBUTES APPRECIABLY TOWARD FURTHER CONCENTRATION OF THAT MARKET, VIOLATES SECTION 7 OF THE CLAYTON ACT

Before the facts about a merger can be intelligently sifted and weighed to determine whether it violates Section 7, it is necessary to have a more precise legal test or standard against which to measure the facts than the bare words of the statute supply. Heeding this Court's direction that "in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration" (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 362), we shall first attempt to derive, from the general policies and objectives of Section 7, some workable legal criteria to guide decision of the specific issues of this case. We postpone to the next part of the argument the task of applying these criteria to the present facts.

A. CONGRESS INTENDED THAT MERGERS BE TESTED UNDER STRICT STANDARDS DESIGNED TO ARREST THE TRANSFORMATION OF SMALL-FIRM, RELATIVELY UNCONCENTRATED MARKETS INTO MARKETS DOMINATED BY A FEW LARGE AND POWERFUL SELLERS

The basic thrust of Section 7 is prophylactic. In enacting a law to control mergers, Congress was not seeking to curb abuses of monopoly power or to punish

restraints upon the freedom of competitors. At least, that was not its central concern. As the legislative history of the Antimerger Act makes clear,[24] and as this Court has repeatedly observed,[25] Congress' paramount concern was with preventing the emergence of a certain kind of market structure or environment—the condition economists call oligopoly, characterized by the concentration of market power in the hands of a few companies. Congress believed, and rightly so, that concentrated or oligopolistic market environments promoted competitive abuses and restraints.

The theory of competition that Congress adopted as the premise of this legislation posits that "'[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share'" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363). Where the major sellers in a market are few, a price cut by one is likely to have so drastic and immediate an adverse effect upon

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[24] See S. Rep. No. 1775, 81st Cong., 2d Sess., p. 5:

> Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern (which economists call oligopoly) is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interests of its rival * * *.

The pertinent legislative history is summarized in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315–318.

[25] See *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363.

the sales of the others as to compel them to respond promptly with matching cuts, thereby wiping out any competitive advantage won by the initiator of the reduction. Realizing this, competitors in an oligopolistic market have little incentive to cut prices. Oligopoly thus promotes price rigidity and discourages vigorous price competition,[26] and in so doing tends to direct rivalry into other channels—such as heavy advertising and promotions—the social benefits of which are less obvious, to say the least, and which tend to create formidable barriers to entry by new competitors.

As the means of arresting the transformation of markets having many sellers of roughly equal size to a state of domination by a few large firms, Congress chose to limit growth through mergers, since mergers had frequently been instrumental in the creation of oligopoly. It was recognized, however, that the process of transformation through mergers from a dispersed to a concentrated market was often gradual, that no single merger was apt to be decisive, and that there was no sharp line below which a market was atomistic and above which it was oligopolistic—and hence that unless the merger law was so drafted as to enable remedial action against a series of mergers, even though each might seem relatively harmless, viewed in isolation, it would be very largely a dead letter. Congress accordingly determined to impose a far stricter standard for judging mergers than that

[26] See, also, pp. 34–35, *infra*.

applied in Sherman Act cases. Under Section 7, no showing is required that a challenged merger in fact harms competition; it is enough if the merger "may" have the effect of substantially lessening competition.

Section 7 thus can and should be brought into play before concentration in an industry has reached a high level, so as "to brake this force at its outset and before it gather[s] momentum." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 318. It follows that the most pertinent question in a merger case is not, what is the immediate impact of the merger upon competition, but, rather, what is the likely future direction of the market's development if the merger is permitted? For, in light of Congress' basic concerns, it is the relationship of the challenged merger to the long-term evolution of the market, not the particular effects of the merger considered by itself, that is critical.

Predicting the long-term future effects of a merger is very difficult, however, because of the many variables involved. It calls more for an economic prophecy than for a conventional legal judgment. Consequently, it has become widely accepted that the merger law cannot be effectively enforced on a completely *ad hoc* case-by-case basis. Workable administration of the law requires that its general standards be translated into sound criteria, as specific as the nature of the problem permits, keyed to the basic statutory goal of preventing undue concentration—criteria that can be administered by a court and understood and applied by businessmen in planning

their affairs, and so impart needed predictability and certainty to the law.[27]

We believe it is quite feasible to formulate an appropriate and reasonably simple legal test to govern mergers between direct competitors in markets that have not yet become, but appear to be on the way to becoming, excessively concentrated. With respect to those mergers, too, we think Congress' "intense * * * concern with the trend toward concentration warrants dispensing * * * with elaborate proof of market structure, market behavior, or probable anticompetitive effects," and that a merger found wanting under the criteria of the test is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363.

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[27] See, *e.g., United States* v. *Philadelphia National Bank,* 374 U.S. 321, 362; *Procter & Gamble Co.,* Trade Reg. Rep. (Transfer Binder 1963–1965), ¶ 16,673, pp. 21573–21574 (FTC); *Beatrice Foods Co.,* 3 Trade Reg. Rep., ¶ 17,244, pp. 22336–22337 (FTC); President's Council of Economic Advisers, 1965 Ann. Rep., p. 135; Elman, *The Need for Certainty and Predictability in the Application of the Merger Law,* 40 N.Y.U. L. Rev. 613 (1965); Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law,* 78 Harv. L. Rev. 385 (1964); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226 (1960); Stigler, *Mergers and Preventive Antitrust Policy,* 104 U. Pa. L. Rev. 176, 177 (1955). Cf. *Standard Oil Co.* v. *United States,* 337 U.S. 293.

B. A MERGER BETWEEN DIRECT COMPETITORS IN A MARKET STILL RELATIVELY UNCONCENTRATED IS PRESUMPTIVELY ILLEGAL IF (1) THE MARKET IS THREATENED BY UNDUE CONCENTRATION AND (2) THE CHALLENGED MERGER INCREASES THE MARKET'S CONCENTRATION SUBSTANTIALLY

1. Since the basic concern of Congress was with forestalling the emergence of concentrated markets, the first element of our test is a determination whether the market in which the merger takes place is threatened with increasing concentration. If there is no evidence of oligopolistic tendencies, the danger posed by a merger that does not itself radically transform the market's structure may be slight; but if the market is already tending toward oligopoly, any further merger-induced increase in concentration requires very careful scrutiny. Various factors are relevant in determining whether a threat of oligopoly exists. One in particular is whether, at the time the merger takes place, concentration in the market is already near the level of oligopoly. The significance of this factor should be apparent. An increase in concentration in a market where the 10 largest sellers have only 10 or 20 percent of the market's total sales clearly presents a less imminent danger of the emergence of behavior characteristic of oligopoly than in a market where the 10 largest have a 40 or 50 percent share. In the latter case, further increases in concentration may well produce a significant impairment of the vigor of price competition. As this example suggests, the adverse effect of a merger which increases con-

centration is more serious when there is already some concentration than when the market is still highly fragmented.

2. The second element of our proposed test is whether the challenged merger significantly raises the existing level of concentration. This has two related aspects. First, did the merger, by eliminating the acquired firm as an independent competitive factor in the market, appreciably increase the aggregate market share of the leading firms? Second, was the acquired firm an important competitive factor? The elimination of such a competitor might be far more serious than the elimination of a number of smaller competitors which, in the aggregate, had the same market share but which were too small to contribute significantly to maintaining competitive conditions in the market. Cf. *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 280–281.

If the merger thus reduces the number of significant competitors in the market and enhances the market position of those that remain, it means that the merger has substantially changed the structure of the market, bringing it palpably nearer to the condition of oligopoly that Congress wanted to avoid. When such a merger occurs in a market already showing signs of oligopoly (the first part of our test), the merger should be forbidden, absent a strong showing to the contrary, because its long-range threat to competition is great.

The two-part test of presumptive illegality we propose, while modeled on, is obviously not identical to,

that of *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363. The circumstances there were different. The market was one in which concentration had already reached very high proportions,[28] and the particular test formulated by the Court—prohibiting a merger where the resulting firm had 30 percent of the business of the relevant market—was designed to deal with mergers occurring in such an environment, already tightly oligopolistic. The Court carefully avoided suggesting that its test was exclusive or that concentration ~~competition~~ of less than 30 percent were necessarily legal (see 374 U.S. at 364–365, n. 41). Where, as in the present case, a different problem is posed—the application of Section 7 in markets not yet highly concentrated but which reflect a definite trend in that direction—another, and stricter, standard is obviously necessary. Otherwise, the purpose of the statute—to prevent markets from reaching such excessive levels of concentration—would be defeated.

It is no answer to say that a merger need not be forbidden unless it actually creates oligopoly. For there is no magic point at which oligopoly springs full-blown into existence. Between the highly fragmented and the tightly concentrated market structure there is a middle area, one broad part of which is certainly a danger zone. No one can say—at least not without an inquiry far broader and deeper than practical law enforcement permits—at precisely what point a particular market will exhibit oligopolistic

[28] The two largest firms prior to the merger had a combined market share of 44 percent.

behavior.[29] It is thus meaningless to speak of allowing firms to merge up to the lower limit of oligopoly; practically speaking, that limit is unascertainable. Hence, once a market has entered the broad danger zone, a merger that substantially increases concentration is too dangerous to be permitted. Any more lax standard, we submit, would be ineffective to prevent the gradual transformation of atomistic into oligopolistic markets and industries.

II

THE MERGER OF VON'S AND SHOPPING BAG IS PRESUMPTIVELY ILLEGAL, SINCE IT APPRECIABLY INCREASED CONCENTRATION IN A MARKET WHICH WAS APPROACHING OLIGOPOLY

A. THE LOS ANGELES METROPOLITAN AREA IS A PROPER MARKET FOR PURPOSES OF THIS CASE

Appellees concede that Los Angeles is "the area of effective competition" within which to appraise the effects of the challenged merger, yet argue—inconsistently, we think—that Los Angeles is not a single market for the retail sale of grocery products in an economic sense. Pointing out that grocery stores and supermarkets draw their customers, not from the entire Los Angeles metropolitan area, but from a much smaller neighborhood area, they contend that figures showing a grocery chain's total sales throughout the

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[29] This is because the critical factor in precipitating oligopolistic behavior is psychological: sellers' assessments of the probable responses of their competitors to any price or other competitive move on their part. Machlup, *The Economics of Sellers' Competition* (1952), p. 351.

entire metropolitan area may distort the chain's actual competitive standing. The contention is without merit. The Los Angeles metropolitan area may meaningfully be regarded as a single market, the principal members of which are in competition with each other, and hence their area-wide sales totals (which we use in assessing the effects of the challenged merger) furnish a reliable index of market structure.

While it is true that a given grocery store or supermarket is unlikely to seek customers throughout the entire Los Angeles area, and in that sense is not a direct competitor of all other grocery outlets there, the principal grocery companies in the area are chains consisting of many separate stores; and some, at least, of their component stores compete directly with component stores of competing chains. Von's, for example, had 27 widely scattered supermarkets and Shopping Bag had 34, and although not all of Von's and Shopping Bag's many branches were in such proximity to each other as to compete directly for consumer patronage, clearly a great many were (see Appendix B, *infra,* p. 47). Appellees' own figures showed that more than 20 percent of the stores operated by the two firms were so located that they were likely to draw customers from overlapping areas; the true figure is nearer 50 percent. (Statement, *supra,* pp. 7, 8, and n. 7.)

The existence of such substantial overlaps suffices to make the Los Angeles grocery chains in fact direct competitors of each other—and not merely partially or intermittently so. For the chains set prices and

advertise them on an area-wide, not a store-by-store, basis (GX 23, 25, 26, R. 2377, 2379, 2382; GX 24 (unprinted)). Suppose that chains *A* and *B*, each of which had 10 stores, both sold cereal for 40 cents, and three of *B*'s stores were located in close proximity to *A* stores but its remaining stores were not; and suppose that *A* decided to lower its price to 38 cents. Unless *B* responded, three of its stores would be adversely affected. Since, the record here indicates, *B* would probably not make a selective price cut limited to the directly affected stores,[30] it would be forced to lower its price for all of its stores including those not directly in competition with any *A* store. In this fashion, the effects of the direct competition between some branches of the chains would be felt equally throughout the entire chains, just as if there were direct competition between every branch. Thus the major chains must be regarded as competing throughout Los Angeles with one another, albeit not all of their component stores draw upon the same pool of customers. So the chains themselves think. They follow each other's prices meticulously[31]—hardly necessary if they were not direct and substantial competitors.

[30] Since the chains advertise on an area-wide basis, it would be impractical for them to set prices on a store-by-store basis. Having advertised a single price, they could hardly charge different customers different prices depending on which branch they shop at. There is also some indication that non-uniform prices within the chain might create legal problems under local law (R. 1995–1996); it might even raise questions, in some instances, under the Robinson-Patman Act. At all events, the record is clear that each chain charges uniform prices throughout the area.

[31] Statement, *supra*, p. 6 and n. 6; and p. 35, *infra*.

B. THE LOS ANGELES GROCERY MARKET, AT THE TIME OF THE MERGER, ALREADY REVEALED A TENDENCY TOWARD THE CHARACTERISTIC STRUCTURE AND BEHAVIOR OF OLIGOPOLY

Before considering the degree to which the relevant market in this case showed signs of oligopoly immediately before the challenged merger, we think it relevant to point out that it is by no means inevitable, absent mergers such as the one challenged here, that this market should come to be dominated by a few firms. First, the market is plainly large enough, in absolute economic terms, to attract and hold many firms—with total annual sales of $2.5 billion, it overshadows many entire industries. Second, the retail grocery business in Los Angeles, as elsewhere in the country, has in fact attracted and maintained a very large number of independent firms. Third, it does not appear that the economies of large-scale operation, or any other considerations of efficiency, dictate that the Los Angeles retail food market be divided among a few large chains. Doubtless there are marginal grocery operators whom the "supermarket revolution" has made technologically and competitively obsolete. But there is no showing in this record that a well managed single-unit grocery—assuming that the single unit is a modern supermarket and belongs to a cooperative—cannot compete effectively with the chains. And certainly the merger of Von's and Shopping Bag—which united two chains already very large—was not necessary on any theory that either firm was incapable, standing alone, of continu-

ing to be a strong and effective competitor. Each was a large and profitable firm, having upwards of 25 modern supermarkets, total sales of more than $80 million a year, and complete warehouse and distribution facilities and trucking fleets (Statement, *supra*, pp. 3-4).

The foregoing circumstances would lead one to expect a market characterized by the dispersion, not concentration, of economic power. Instead—and, as we shall note, largely as the result of earlier mergers—the market already seems well on the road to oligopoly.

1. At the time of the merger of Von's and Shopping Bag in 1960, a small number of large chains accounted for a relatively large share of the market. The 10 largest (less than 3/10 of one percent of the total) had an aggregate share of 43.6 percent of all retail sales of grocery products in the area (R. 3023, Statement, *supra*, p. 13, n. 16), which left the remaining 56.4 percent to be divided among almost 4,000 smaller firms. These 10 firms thus did in the neighborhood of a billion dollars' worth of grocery business in this one metropolitan area. The eight largest sellers accounted for some 39 percent of the market's total sales, the four largest for 23.5 percent, and the three largest for 19.1 percent.

Bearing in mind the vast size of this market and its traditional small-firm character, the amount of concentration immediately prior to the merger was substantial. To be sure, concentration had not reached the same height as it has in many American industries and markets. It had not reached a level at which price rigidity or other characteristic competitive ills

of oligopolistic markets were evident. But the combined market share of the leading sellers was at a level that economists would consider characteristic of at least a loose oligopoly. See Bain, *Industrial Organization* (1959), pp. 32–33, 131–132. That is to say—as we explain shortly (pp. 34–36, *infra*)—sales were already sufficiently concentrated in a few firms that they identified each other as major competitors whose actions and responses must be carefully considered in planning price and other competitive moves.

2. Moreover, concentration, mirroring national trends in the retail food industry,[32] was on the rise. According to Bureau of the Census figures, the aggregate market share of the eight largest sellers in the Los Angeles retail grocery market rose from 33.7 percent in 1948 to 40.9 percent ten years later, and the share of the 12 largest rose in this period from 38.8 to 48.8 percent (GX 7, R. 2331). Mergers were

[32] According to the January 1960 staff report to the Federal Trade Commission entitled *Economic Inquiry into Food Marketing, Part I—Concentration and Integration in Retailing*, p. 5, between 1948 and 1958 domestic food chains with 11 or more stores at the end of 1958 increased their share of total grocery store sales from 34.5 percent to close to 43 percent, an increase of 24.6 percent. See, also, Mueller and Garoian, *Changes in the Market Structure of Grocery Retailing* (1961), pp. 48–67, 115–131. And in many local markets, concentration has reached very high levels. Figures offered by appellees show that in Detroit, 5 grocery chains have 52 percent of the sales; in Kansas City, 5 have 57 percent; in Atlanta, 5 have almost 70 percent; in Pittsburgh, 3 have about 50 percent; in Washington, D.C., 4 have 75 percent; in Philadelphia, 4 have more than 65 percent (DX BB, R. 1658, 1949).

largely responsible for these increases (Statement, *supra*, pp. 10–12).[33]

3. The pricing policies of the major grocery chains in Los Angeles indicate that the market was approaching oligopoly conditions. When a few firms account for a large proportion of the sales of a market, each is likely to make his pricing decisions with conscious reference to the pricing policies of the

[33] In Finding No. 80 the court below stated that "[t]here has been no increase in concentration in the retail grocery business in the Los Angeles Metropolitan Area either in the last decade or since the merger. On the contrary, economic concentration has decreased" (R. 3087). This is a conclusory finding without adequate record support and rests largely on (1) the asserted ease of entry into the market—a factor distinct from concentration (see pp. 39–40, *infra*), and (2) a defense exhibit (DX AN, R. 2788) purporting to show that the aggregate market shares of the top three, four, and five firms declined slightly between 1952 and 1960. This evidence is completely inconclusive. ~~(a)~~ The 1960 figures in this computation were based on a projection of experience during the first six months and the figures for the other years are also based on rough estimates. The government's statistics showing an increase in concentration between 1948 and 1958 were supplied by the Bureau of the Census; their accuracy is not questioned. Even using defendants' figures, one finds that there was an increase in the aggregate market shares of the leading three, four, and five firms if one uses almost any base year except 1952, which appears to be unrepresentative. Finally, to the extent there was any decrease between 1952 and 1960, it was apparently due to the steep decline of Safeway, which between 1948 and 1958 saw its market share fall from 14.2 to 8 percent and this was due to a nonrecurring factor: Safeway's decision to sell off or close its many small stores and convert to modern supermarket operations. In 1931, Safeway had had 1,000 stores in the Los Angeles area (Fdg. 18, R. 3069); in 1960, it had only 146 (Fdg. 74, R. 3084). Finding No. 80, incidentally, was drafted by the defendants; the district court's opinion nowhere mentions a decline in concentration.

others, and to be reluctant to initiate price reductions. "[P]arallel policies of mutual advantage, not competition, * * * emerge." *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280.[34]

By the time of the challenged merger, the leading grocery chains in the Los Angeles market had reached a significant stage on the way to consciously interdependent pricing. The record indicates that the major chains (including Von's and Shopping Bag) were accustomed to study carefully the prices charged by competing major chains, and that each strove to maintain the same prices as the others; they evidently believed that they could not afford to be undersold by any member of their ranks. This is not to say that concentration had reached the stage where vigorous price competition was seriously impaired. But it had reached the stage—which precedes and foreshadows oligopolistic pricing—where a few sellers, by reason of their size in the market, have emerged as the market's major competitors, have identified each other as the rivals to be watched,[35] and have decided that their own competitive fortunes are to some degree interdependent with those of these rivals. This merger is a substantial step toward the point where these majors—their market shares being such

[34] See, *e.g.*, Chamberlin, *The Theory of Monopolistic Competition* (7th ed., 1956), pp. 48-49; Fellner, *Competition Among the Few* (1949), pp. 177-183; and pp. 21-22, *supra*.

[35] The record clearly shows that the major chains in the Los Angeles retail grocery market recognize each other as their principal competitors (GX 23, 25, R. 2377, 2379; GX 24 (unprinted); GX 26, R. 2382; GX 84 (Appendix B, *infra*, p. 47); DX AV, R. 2881-2883, 2885 ff.).

that a price cut by one would have so drastic an impact on the business of the others as to compel an immediate matching response by all, wiping out the price cutter's advantage—decide that the game of vigorous price competition is not worth the candle.

C. THE MERGER OF VON'S AND SHOPPING BAG SIGNIFICANTLY INCREASED THE CONCENTRATION OF SALES IN THE RELEVANT MARKET IN A FEW LARGE FIRMS

In a large market, which is capable of supporting many firms none relatively very large, but in which sales have already become significantly concentrated in a few large firms, the importance of strictly scrutinizing any merger that increases concentration still further is manifest. In such a market—the kind we have here—a few substantial mergers are all that would be needed to complete the transformation of the market structure into a tight oligopoly. We believe that the challenged merger was such a substantial merger and should be barred in order to prevent further deterioration in the market's structure.

The merger eliminated a major competitor which at the time of the merger was the sixth largest retailer of grocery products in the market. A prosperous chain of modern supermarkets, enjoying 4.2 percent of the total sales of this vast market, Shopping Bag was clearly one of the market's leaders. Its elimination significantly reduced the already small number of firms which enjoyed substantial market shares. The fewer such firms, the likelier it is that the market will show the lessened competition characteristic of oligopoly. The merger also substantially increased

the aggregate market shares of the leading sellers. The aggregate share of the two largest (which after the merger were Von's and Safeway) rose from 14.4 to 16.9 percent. The aggregate share of the three largest firms rose from 19.1 to 23.3 percent. That of the four largest rose from 23.5 to 27.7 percent, and that of the eight largest from 38.8 to 41.6 percent.[36] (See Statement, *supra*, p. 13, n. 16; see, also, GX 4, R. 2329.)

Since the concern of the law is with long-term trends to concentration, it is also appropriate to compare the level of concentration as it was in the fairly recent past with the level reached after the merger. By this measure, the concentration of the Los Angeles retail grocery market's sales in the eight largest firms rose from 33.7 percent in 1948 to 41.6 percent (1958 figures) after the merger.[37] It has been suggested

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[36] In using the sum of the pre-existing market shares of the merging companies in these calculations, we follow *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343, n. 70. To be sure, the district court here found that at the time of the merger (1960), the merging firms' market shares were less than they had been in 1958 (the year used by the government in its computations). We have already explained why appellees' 1960 figures are less reliable. See n. 33, *supra*, p. 34.

[37] It is true that if the top four, rather than eight, firms were chosen, the increase would be substantially smaller. But there is every reason to be concerned with a market moving steadily toward domination by eight firms even if concentration among the top four is increasing less rapidly; a market completely dominated by only eight sellers would be very likely to display the behavioral characteristics of oligopoly. At the other end, if the top 12 or 20 chains were chosen for purposes of comparison between 1948 and post-merger concentration levels, the

that such a rise is alone enough to condemn a merger. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 313, 316 (1960). At all events, it is apparent that the concentration of business in the hands of the major chains was appreciably higher after than it had been before the merger.

The precise impact of this increase in concentration upon the competitive health of the market cannot, of course, be gauged. It may indeed be small. But this much is clear: The merger moved a market already approaching oligopoly a pronounced step further in that direction. And it is obvious that only a few more steps of comparable magnitude would be necessary to make the concentration of the market so great that competition would be clearly weakened. The government is not required to await such further changes. This is the appropriate point for remedial action against a "cumulative process" of concentration. H. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. See *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 342-344, 346; *United States* v. *Continental Can Co.,* 378 U.S. 441, 464. In the setting of a market already

increase would be much greater than for the top eight. But there is less reason to be concerned with eventual domination of a market by a relatively large number of sellers; oligopoly requires that the controlling sellers be few. Eight is a frequently used, if admittedly somewhat arbitrary, dividing line. Bok, *supra,* this page, p. 313, n. 262. Of course, there is all the more reason to be concerned with the threat of oligopoly when, as in this market, the effect of the merger is to increase substantially the already significant aggregate share of fewer than eight firms—the top two, three, or four, for example.

tending toward oligopoly and having a history of merger-induced concentration, this merger has significantly increased the danger that competition will be substantially injured. That is all the statute requires.

III

THE PRESUMPTION OF ILLEGALITY HAS NOT BEEN REBUTTED

We consider in this part whether appellees have shown any persuasive reason why, in the face of the facts marshaled in the preceding part, this merger should not be held illegal. They plainly have not.

A. THE CONDITION OF ENTRY BY NEW COMPETITORS INTO THE MARKET SEEMS UNLIKELY TO OFFSET THE MERGER'S ADVERSE EFFECTS

Appellees assert that there is complete ease of entry into the Los Angeles retail food market. Even if this were true—and we show next that it is not—it has not been shown that the condition of entry is such as to cancel or cure the undesirable effect of the challenged merger upon the structure of a market already moving in the direction of oligopoly.[38]

Ease of entry could presumably affect competitive conditions in a market in one of two ways. First, the threat of new competition might act as a restraining

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[38] See *Ekco Products Co.*, Trade Reg. Rep. (1963–1965 Transfer Binder), ¶ 16879, p. 21901 (FTC), affirmed, 347 F. 2d 745 (C.A. 7); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 260 (1960). Cf. Bain, *Barriers to New Competition* (1956), p. 189; Bain, *Industrial Organization* (1959), p. 425.

influence upon the prices charged by existing sellers. But even so, there would certainly be a range within which existing sellers could charge relatively high prices without fear of attracting additional sellers into the market. Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 425 (C.A. 2). Hence, easy entry alone cannot be relied upon to prevent oligopolists from exploiting their market power.

The second possibility is that ease of entry might result in so substantial an influx of new competitors as to lower concentration appreciably. But, again, there is no evidence that this is in fact likely here. Entry was no less easy between 1948 and 1958, and indeed many new grocery companies did appear during that period, but concentration did not decrease; it increased.

At all events, the asserted ease of entry is overstated. Entry and expansion by small operators is in fact sharply limited, due to the preference of shopping-center owners for established large chains. The court below expressly found that shopping centers—increasingly important as supermarket sites—prefer "a large grocery chain with a well-advertised name" and a secure financial position; "smaller concerns therefore have difficulty in obtaining shopping center locations" (Fdg. 54, R. 3081). Thus, most of the new permits for larger stores are secured by the 20 leading chains, which in 1960 opened 25 of the 29 new stores that had sales of more than $2 million each (GX 37, R. 2413), and which accounted for 67.8 percent of the total sales of all new grocery stores opened that year (GX 43, R. 2417). And the capital requirements for opening a new supermarket—about $700,000

exclusive of the cost of land (R. 1286–1288)—are by no means negligible.

Moreover, to the extent that the large size of existing competitors inevitably acts as a psychological deterrent to the entry or expansion of smaller firms, it is clear that the growing concentration of the Los Angeles retail grocery market—significantly advanced by the challenged merger—will make new entry increasingly unattractive. If entry is relatively easy today, it is unlikely to remain as much so if mergers such as this one between substantial competitors are permitted. Cf. *Procter & Gamble Co.,* Trade Reg. Rep. (Transfer Binder 1963–1965), ¶ 16673, pp. 21578–21579 (FTC). Hence, it is illusory to seek to justify this merger on grounds of ease of entry. The merger certainly will not increase the ease of entry, and it may have the opposite effect.[39]

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[39] Nor is the development of food merchandising through discount houses likely to have a limiting effect on concentration in the market. The district court found that this method of distribution has become "increasingly popular," "is expanding rapidly and may well indicate a substantial additional competitive force" in the Los Angeles area (R. 3027; Fdg. 61, R. 3082). The record does not show, however, how much business the food departments of discount houses actually did There were only 37 of these in existence at the time of trial (R. 1385), and five more were opened after the trial (Stipulation after Trial, R. 2326), making a total of only 42 out of 4,800 stores. Moreover, this new form of grocery retailing may well aggravate rather than reduce concentration. For at least 15 (and probably 19, in view of Food Fair's acquisition of Fox Market) of the 42 were operated by chains that were among the ten largest in 1958 (GX 4, R. 2329)—a much larger share than these leading chains had of total stores in the area.

B. IN VIEW OF THE CONCERNS WHICH ACTUATED CONGRESS IN ENACTING THE ANTIMERGER ACT, EVIDENCE THAT THE MARKET REMAINS VIGOROUSLY COMPETITIVE IS ENTITLED TO LITTLE WEIGHT

Admittedly, there is evidence that the retail grocery market in Los Angeles remains competitive despite Von's acquisition of Shopping Bag. In giving great weight to that evidence,[40] however, we think the district court clearly misconceived the thrust of Section 7. Congress was not primarily concerned with preventing mergers that resulted in actual and immediate competitive injury; such mergers were forbidden by Section 1 of the Sherman Act. Its concern, rather, centered on mergers which, while occurring in markets still competitive, and while not perceptibly reducing competition, contributed materially to a movement toward oligopoly—a movement which eventually would produce substantial adverse effects on the health and vigor of competition. We do not contend that such effects are already manifest in the Los Angeles market, or that the challenged merger created a full-blown oligopoly. But we have shown that the merger seriously aggravated a tendency toward oligopoly, and hence that its long-term effects

[40] The district court relied especially heavily on evidence that in the few years between the consummation of the merger and the trial the merger appeared to have had no adverse effects on competition (Fdgs. 52, 66, 82(e), 83, R. 3080, 3083, 3088–3089). Such reliance was contrary to this Court's observation that, while post-acquisition evidence in a merger case is relevant, it is not controlling, since "the force of § 7 is still in probabilities, not in what later transpired" (*Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598).

may be seriously adverse. The prophylactic function of the Antimerger Act would be crippled if such a merger could be justified by proving that it produced no immediately discernible impairment of competition.

C. THE MERGER CANNOT BE EXCUSED ON THE GROUND THAT THE MERGING FIRMS WERE LOCAL RATHER THAN NATIONAL IN THE SCOPE OF THEIR OPERATIONS

Appellees stress that Von's and Shopping Bag were local, not national, grocery chains. This is true in the sense that their operations were limited to the Los Angeles metropolitan area; it does not mean they were small firms. The Los Angeles area constitutes a vast market for the retail sale of grocery products. Von's and Shopping Bag, both market leaders, had aggregate sales in the year of the merger of almost $180 million. They were much larger than the vast majority of their competitors. And they were profitable and growing. The merger of such firms, resulting, as we have seen, in a substantial increase in concentration in a $2.5 billion market already tending toward oligopoly, cannot be excused on the ground that these firms—like the merging banks in *Philadelphia Bank*—were local.

We grant that the grocery industry contains a number of larger and geographically more diversified firms than Von's and Shopping Bag—although we note that the merger made Von's the nation's sixteenth largest grocery chain.[41] We also grant that some of the na-

[41] See *Economic Inquiry into Marketing* (FTC Staff Report), *supra*, n. 32, p. 33, at p. 76, Table 28 (1958 figures).

tional chains have engaged in recent years in extensive merger activity, including acquisitions in the Los Angeles metropolitan area. The merger activity of the major national chains has, in fact, been challenged in several formal proceedings, and is the subject of several current investigations, under Section 7.[42] But an enforcement program which completely ignored mergers by powerful local chains would be fatally incomplete. It is the local areas, like Los Angeles, that are the effective areas of competition in the grocery industry. If they are permitted to become oligopolistic, the congressional mandate in this industry will be thwarted.

We need scarcely add that a decision by this Court holding illegal the Von's-Shopping Bag merger will not mean that small firms in the retail grocery industry cannot merge, the better to compete with large firms. There is not the slightest indication that this merger—the largest that ever took place in this market—was necessary to enable Von's or Shopping Bag to compete effectively with anyone. And viewed in their market setting, they were plainly large, not small, firms. Furthermore, the market was already

[42] See *Kroger Co.*, F.T.C. Docket 7464 (complaint issued April 1, 1959); *National Tea Co.*, F.T.C. Docket 7453 (complaint issued March 26, 1959; hearing examiner's decision, April 5, 1963; pending on appeal to Commission); *Grand Union Co.*, F.T.C. Docket 8458 (complaint issued January 12, 1962; hearing examiner's decision October 4, 1963; consent order of divestiture issued by Commission, June 10, 1965). In *Kroger*, Commission counsel have moved to amend the complaint to add a challenge to Kroger's acquisition of the Market Basket chain in Los Angeles. The acquisition of Alpha Beta by Acme Stores, Inc. is currently being investigated by the Department of Justice.

tending toward undue concentration; the legality of mergers in completely fragmented markets is not here in issue.

This case presents the sole issue whether, in a market that is already a loose oligopoly, the merger of two of the market's leaders, which between them control almost 10 percent of the business of the market, is "an appropriate place at which to call a halt" to a further rise in concentration (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 346). We submit that it clearly is, and that appellees have not shown that sanctioning this merger, in the face of its adverse effect upon the competitive structure of the relevant market, would nevertheless be consistent with the policies that underlie the statute.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with directions that the court enter an appropriate remedial degree.

Respectfully submitted.

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FEBRUARY 1966.

APPENDIX A

The exhibits cited in this brief were admitted in the record as follows:

Government exhibit:		Record page
GX	2–27	35
	29–71	35
	72	38
	78	1193
	84	2000
	85	2062
	87	2063

Von's-Shopping Bag Exhibit:		Record page
DX	AF	1165
	AM	1189
	AN	1189
	AV	1275
	BB	1162
	BF	1186